

No. 83-27

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

AXEL N. ELIASSEN, on behalf of himself
and all others similarly situated,

Petitioner,

v.

GREEN BAY & WESTERN RAILROAD COMPANY,
H. WELDON McGEE, R. B. WILSON, JOHN
WINTHROP and CHARLES W. COX II,

Respondents.

ON PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

Of Counsel:
Charles A. Grube
780 N. Water St.
Milwaukee WI 53202
(414) 277-5000

Thomas O. Kloehn
780 N. Water St.
Milwaukee WI 53202
(414) 277-5000

Counsel for
Respondents

QUESTIONS PRESENTED

I. Is the dicta in a Wisconsin Supreme Court decision construing the language of certain Class B Debentures, and stating that language defining payment on principal . . . "as to distribution on liquidation puts the holders of the Class B Debenture on the footing of stockholders of an ordinary corporation . . . It makes them instead of the stockholders, the owners of the equity of the corporation . . ." res judicata on the issues in this case as to whether holders of Class B Debentures (1) have the rights of stockholders of the Green Bay & Western Railroad Company (hereafter "GB&W"), and (2) stand in the shoes of minority shareholders to whom the capital stockholders and the directors would owe a fiduciary duty?

II. Did GB&W's directors have a fiduciary duty to Class B Debenture holders to oppose a tender offer and strive for a sale of assets or merger of GB&W, because a sale or merger would produce a greater return to Class B Debenture holders?

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CITATIONS TO LOWER COURT DECISIONS

The decision of the Court of Appeals for the Seventh Circuit affirming the judgment of the District Court in this case is reported among decisions without published opinions at 705 F.2d 461 (7th Cir. 1983).

AUTHORITIES OF LAW INVOLVED

If the District Court erred in holding that Biltchik v. Green Bay & Western Railroad Co., 250 Wis. 177, 26 N.W.2d 633, cert. denied 332 U.S. 835, 68 S. Ct. 216, 92 L. Ed. 408 (1947), is not res judicata in this case, then the Class B Debentures for the purposes of this case are "income bonds" and not stock, so the error, if any, was harmless.

Respondent Green Bay & Western Railroad Company is a subsidiary of IteI Corporation.

28 USC 2111

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defect which do not affect the substantial rights of the parties.

Rule 61, Federal Rules of Civil Procedure

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or anything done or omitted by the court or by any of the parties is grounds for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

STATEMENT OF THE CASE

This case was decided below on cross motions for summary judgment upon undisputed facts. At oral argument petitioner's counsel assured the Court of Appeals that petitioner does not dispute any of the

District Court's factual findings. Contentions in the petition that conflict with the facts found by the District Court (Pet. 1a-26a) should be disregarded.

This class action, together with the copending action by certain class members in the same Court entitled Drexler, et al. v. Green Bay & Western Railroad Company, et al., 80-C-1155, constitute the second assault by Class B Debenture holders to obtain GB&W's assets. Here petitioner seeks relief from the judgment that denied his claims for damages equaling the market value of nearly all of GB&W's net worth. Petitioner claims that by operation of res judicata, the decision in Biltchik v. Green Bay & W. R. Co., which dismissed the Class B Debenture holders' earlier attempt to obtain nearly all of GB&W's net worth, requires the

Court here to arrive at the opposite result.

GB&W's Class B Debenture is a species of security devised in the 19th Century to obtain foreign funds to finance railroad construction, and to aid in reorganizing insolvent railroads. Owing to enactment of federal bankruptcy and reorganization laws, income taxation, changed economic conditions and modern developments in securities financing, that species of security has become virtually extinct. It is noteworthy here that the terms of the indenture for GB&W's Class B Debentures appear only on the faces of the debentures.

As the District Court here found on the undisputed facts, "The very limited rights granted by the terms of the Class B debentures can only be understood by recognizing that these debentures were

issued in exchange for worthless securities in the Green Bay, Winona & St. Paul Railroad Company." (Pet. 13a) That is, the Class B Debenture holders contributed nothing to GB&W that could either generate income, or provide assets with which to pay the \$1,000 face value promised by each debenture. The Class B Debenture holders risked nothing. In short, the Class B Debenture holders have no greater economic justification for a claim of income or principal against GB&W than would any member of the general public. Nevertheless, the terms on the face of the debentures give holders contract claims.

GB&W's capital structure occasioned no litigation during the first 48 years of GB&W's existence. Controversy began in 1944. The IRS, on the basis of the 1936 Revenue Act, reversed its 1924

ruling and disallowed GB&W's deductions of 1937 and 1939 payments to Class A and B Debenture holders. Green Bay & Western Railroad Company, et al. v. Commissioner of Internal Revenue, 3 Tax Ct. 372 (1944), aff'd 147 F.2d 585 (7th Cir. 1945).

Also in 1944, Class B Debenture holders made their first assault on GB&W. Williams and two other Class B Debenture holders brought a class action against GB&W on behalf of all Class B Debenture holders, originally in the Supreme Court, New York County, and later removed to the U.S. District Court. Williams, et al. v. Green Bay & W. R. Co., 59 F. Supp. 98 (S.D.N.Y. 1944). Williams alleged that the terms of GB&W's Class B Debentures required payment of all surplus net income to the Class B Debenture holders, after payment to Class A Debenture holders and Capital stockholders, demanding as

damages the difference between total annual surplus net income and the amount paid on Class B Debentures. Defendant's venue motion was granted, affirmed on appeal, but reversed on certiorari. Williams, et al. v. Green Bay & W. R. Co., 59 F. Supp. 98 (S.D.N.Y. 1944); 147 F.2d 777 (2nd Cir. 1945); 326 U.S. 549, 90 L. Ed. 1311 (1946).

As here, the Class B Debenture holders also filed a second, simultaneous action in 1944. Paul Sperling on behalf of the holders of Class B Debentures sued GB&W and its directors in the Supreme Court, Kings County, seeking the same relief on the same theory as Williams. Sperling v. McGee, et al., 49 N.Y.S.2d 477 (1944); 51 N.Y.S.2d 274 (1944); 52 N.Y.S.2d 229 (1945); Williams, et al. v. Green Bay & W. R. Co., 59 F. Supp. 98

(S.D.N.Y. 1944). Defendants challenged jurisdiction, but were unsuccessful.

Meanwhile, Aaron Biltchik and Florence Brill, who were also represented by Sperling's attorneys, purchased 18 Class B Debentures and sued GB&W and its directors in the Wisconsin Circuit Court for Brown County on behalf of all Class B Debenture holders demanding the same relief on the same theories as Sperling and Williams. (A.1a-11a)* The Biltchik case was tried in January of 1946, decided on April 24, 1946 (A20a-27a), and the judgment, dated May 13, 1946, dismissed the action. The Williams case was then dismissed by summary judgment on res judicata. Williams, et al. v. Green Bay & W. R. Co., 68 F. Supp. 509 (S.D.N.Y.

*"A" refers to the appendix to this Brief, followed by page number.

1946). Sperling's case was similarly disposed of. Sperling v. McGee, et al., 73 N.Y.S.2d 406 (1947).

The trial Court in the Biltchik case, based upon the circumstances culminating in the issue of the Class B Debentures, found that,

The reason for the unusual provisions in the Class B Debentures, therefore, becomes crystal clear. It was not only expedient, but absolutely necessary that the Class B debentures, which were income bonds, should contain drastic restrictions as to payment of income, and that they be definitely and even arbitrarily subordinated to the holders of Class A debentures and common stockholders in the new company. (A.22a-23a)

The Biltchik Court described the subject matter litigated as follows: "This action is brought to recover the balance due on interest to the Class B debenture holders upon a covenant contained in the debentures . . ." (A.24a) Finally, the Court concluded:

That the Class B Debentures of the defendant corporation are hereby construed to mean that none of the income or earnings of the defendant corporation is payable to or distributable to the holders of such Debentures unless and until the Board of Directors of the defendant corporation, in their discretion, so declare by resolution. (A.33a)

On appeal, the Wisconsin Supreme Court found that,

The scheme of reorganization was manifestly planned to assure that the holders of the subordinate securities should receive nothing whatever until the holders of the new Class A debentures and new stock were compensated both through current income and on liquidation of the new corporation, and this must be borne in mind in construing the provisions of the Class B debentures on which the suit is based. (Pet.32a)*

Based on that finding, the Wisconsin Supreme Court construed the language in the Class B Debentures governing payments on income as follows:

*"Pet" followed by a page number refers to a page in the Petition for Certiorari.

This makes the payment out of the earnings of any year discretionary with the directors; that is they may retain the net earnings of any year after the Class A debenture holders and stockholders have been paid to apply to betterments, if in their reasonable judgment proper management so requires. (Pet.33a)

and

Upon all the terms of the Class B debentures the holders of the Class B debentures can receive no income until after all expenses of operation and maintenance have been paid and the holders of the Class A debentures and common stock have each been paid their five per cent as interest and dividends. (Pet.34a)

The Supreme Court then affirmed. Biltchik v. Green Bay & W. R. Co., 250 Wis. 177, 26 N.W.2d 633, cert. denied 332 U.S 835, 681 S. Ct. 216, 93 L. Ed. 408 (1947).

Rumors circulating in the late 1960s and early 1970s that GB&W was about to sell its assets to, or merge with a larger railroad, led Eliassen and his broker and plaintiffs in the copending Drexler case, who are represented by the

same lawyer, to buy Class B Debentures in hopes of redemption according to the terms on the debentures. They were disappointed. Instead of a merger or asset sale, a tender offer contest developed that culminated in the 1978 acquisition of 99.7% of GB&W's outstanding capital stock and 77% of the outstanding Class B Debentures by Itel Corporation.

The disappointed Class B Debenture speculators litigated in the ICC, before the Wisconsin Commissioner of Securities, and even in the Courts (A&K Railroad Material, Inc. and Drexler, et al. v. Green Bay & W. R. Co., 437 F. Supp. 636 (E.D. Wis. 1977)), trying to force up the price offered for Class B Debentures. Their stratagems failed. In desperation they filed this and the copending Drexler

actions in the District Court, directly attacking Itel's tender offer take-over. However, Itel went into Chapter XI reorganization. Plaintiffs dropped Itel from their actions rather than join the other creditors in the Bankruptcy Court, leaving only GB&W and its directors for targets.

Petitioner alleges that dicta in the Wisconsin Supreme Court's Biltchik decision converted Class B Debentures into equity securities, and, by what may be described as a quantum jump, petitioner proclaims that respondents owe Class B Debenture holders the same fiduciary duties owed to minority shareholders, if there were any. (A.46a-47a) However, respondents also pleaded res judicata (A68a), contending that the above-quoted Circuit Court decision held Class B Debentures to be "income bonds," and consequently the

rights of the Class B Debentures are defined by the express terms of the debentures.

The Courts below found that the questions of the type of security the Class B Debentures are and the rights their holders might have as a consequence were neither litigated in nor decided by the Courts in the Biltchik case. (Pet.18a) The Courts below found that Biltchik only construed the terms of the Class B Debentures affecting the holders' rights to income. (Pet.18a) The District Court then concluded on its independent review of the terms of the debentures and the plan of reorganization which resulted in creation of GB&W that Class B Debenture holders are not minority shareholders (Pet.22a) and do not have the rights of shareholders. (Pet.20a) The Court of Appeals affirmed. (Pet.27a)

Thus, Eliassen, et al. are left without a claim upon which relief could be granted, and Drexler, et al. are confined to the limitations of the Biltchik decision in their demands for income. Eliassen petitions this Court for relief from that result.

ARGUMENT

- I. NO GENUINE ISSUE OF LAW, FEDERAL OR STATE, PERTAINING TO RES JUDICATA IS RAISED BY THIS PETITION.

Upon their examination of the pleadings, (A.1a-19a) abstracts of the testimony, decisions, (A.20a-27a; Pet.29a-36a) findings of fact (A.28a-35a) and appellate briefs in the Biltchik case, and the Courts below found as follows:

In Biltchik v. Green Bay & Western Railroad, 250 Wis. 177, cert. denied 332 U.S. 835 (1947), the plaintiffs, for themselves and all holders of Class B debentures, also sought to compel the GB&W to make annual payments of net income. (Pet. 12a)

. . .

The Biltchik Court relied on the provisions of the Class B debentures regarding the distribution of annual income and the distribution upon a sale or reorganization of the railroad. (Pet. 13a)

. . .

In light of those provisions of the debenture, the Court held that the following provision made payment out of annual earnings discretionary with the directors: "the amounts, if any, payable upon this series of debentures out of the net earnings in any year, will be fixed and declared by the board of directors on or before the first day of February in the following year." 250 Wis. at 181. . . . (Pet. 13a)

Petitioner tacitly concedes the accuracy of the lower Courts' following statement of petitioner's contentions of res judicata:

The other basis that plaintiff asserts for imposing thi [sic] duty on the directors is the Biltchik case. Plaintiff argues that Biltchik found that the Class B debenture is in effect the true common stock of the GB&W. (Pet. 13a)

The Courts below ruled on the application of res judicata to those issues, as follows:

The Court also concludes that Biltchik is not res judicata for purposes of the issues posed in this case. Biltchik only decided what rights the Class B debentureholders have to annual income earned by the GB&W. The trial court's reference to the debentures as "income bonds" must be read in this context. Further, although the supreme court stated that "as to distribution on liquidation" the debentureholders were "on the footing of stockholders of an ordinary corporation," this statement was made as an analogy in the context of the Court's conclusion that the increased equity of the GB&W will benefit the Class B debentureholders upon payment on the bonds. The Court was not concluding that the Class B debentureholders enjoyed all the rights of common stockholders, nor that they were the only security holders with an interest in the equity of the GB&W. Rather, the Court was simply observing that by their terms, the Class B debentures are to be paid out of the equity of the company that remains after payment of prior claims and of \$600,000 to the Class A debenture holders and \$2,500,000 to the capital stockholders. (Pet. 18a)

The Courts below never reached a question of law pertaining to res judicata. When the lower Courts found that the issue of whether Class B Debenture holders have the rights of shareholders was not and could not have been litigated in the Biltchik case, and that those courts neither decided, nor in any way acted upon that issue, there remained no possibility that the law of res judicata could apply here. The Courts below found that the different passages relied upon by petitioner and respondent, when read in context, were merely explanatory of the reorganization plan, and not an action or decision on any issue in this case. This Court, in Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744, 752 (1961), refused to apply res judicata for the same reason. Therefore there is no issue

of law, state or federal, presented by this petition.

II. IF THE LOWER COURTS ERRED IN FINDING THAT THE BILTCHIK CASE IS NOT RES JUDICATA, IT WAS A HARMLESS ERROR, AND NOT A PROPER SUBJECT FOR THIS COURT'S REVIEW.

Even if this Court, upon examining the entire Biltchik record were to conclude that the lower Courts erred, and that the issue of the rights of the Class B Debenture holders dehors the express provisions on the debenture was or could have been raised in Biltchik, such error would be harmless.

First, the only statement by either Court in Biltchik declaring precisely what type of security the Class B Debenture is--not merely what it is like after liquidation of GB&W--appears in the decision of the Circuit Court for Brown County. That Court stated that the Class

B Debentures "were income bonds, . . ."
(A.22a) The Wisconsin Supreme Court affirmed without mentioning the Circuit Court's statement, and without identifying the security other than calling it by name. If the Circuit Court's declaration is a decision on the issue, then the Class B Debenture holders cannot have the rights of stockholders. That is the same conclusion the Courts below reached by their independent analysis.

Second, even if the Class B Debentures were held to be equity securities by Biltchik, the holders still would not be shareholders. Only the Capital stockholders are shareholders. Hence, even if Class B Debentures were also equity securities, the rights of holders would be defined by the provisions of the debentures, and they would not have the

rights of shareholders. Cf. Broad, et al. v. Rockwell Int'l Corp., 642 F.2d 929, 940, 944, 946-948 (5th Cir. 1981); Lisman v. Milwaukee, L.S.&W. Ry. Co., et al., 163 F. 472, 480 (E.D. Wis. 1908), aff'd 170 F. 1020 (7th Cir. 1909), cert. denied 214 U.S. 520, 53 L. Ed. 1065, 29 S. Ct. 700 (1909); Carson, Pirie, Scott & Co. v. Duffy-Powers, Inc., 9 F. Supp. 199, 201-202 (W.D.N.Y. 1934). Thus, res judicata would compel the same conclusion as the lower Courts reached by their independent analysis.

Petitioner's argument on page 10 that Class B Debentures have been traded for 30 years on the basis of the Biltchik decision has no factual support. The only real purchases, by real persons for real reasons of record here are those of Eliassen, and the Drexler plaintiffs in

the copending case, who bought Class B Debentures on the basis of their construction of the terms on the debentures and rumors of an impending sale of GB&W's assets to, or a merger of GB&W with a larger railroad. Eliassen had not even heard of the existence of the Biltchik case until after his purchases.

In short, the most that could be achieved by granting the petition would be to remand this case with instructions to erase the independent ratio decidendi, substitute res judicata, and leave the judgment of dismissal unchanged. A clearer case of harmless error can scarcely be imagined. Thus, the petition should be denied on the grounds that review is precluded by 28 U.S.C. 2111 and Rule 61 of the Federal Rules of Civil Procedure.

III. THE RES JUDICATA EFFECT OF BILTCHIK
IS A MATTER OF WISCONSIN LAW EXCLU-
SIVELY, AND NOT A PROPER SUBJECT FOR
THIS COURT'S REVIEW.

Federal courts must apply state law to determine the preclusive effect of a state court decision. 28 U.S.C. §1738; Haring v. Prosise, 103 S. Ct. 2368, 2373 (1983). This Court has stated that a challenge to a lower federal court's determination of this state law issue will "rarely constitute an appropriate subject of this Court's review." Haring v. Prosise, 103 S. Ct. at 2373, Note 8.

This case invokes only state law, already determined by the District Court and the Court of Appeals. Under Supreme Court Rule 17, the petition should be denied.

IV. THE DUTIES OF CORPORATE DIRECTORS TO THE CORPORATION'S SECURITIES HOLDERS ARE MATTERS OF STATE LAW, NOT FEDERAL COMMON LAW.

The petitioner's contention that Congress in enacting the Williams Act left a gap in corporate law that should be filled by a body of federal common law, which this Court should create anew for this case (Pet. 11), is singularly devoid of merit even in the context of this petition. However, it is rivaled by petitioner's later representation that the lower Courts purported to establish a general principle of corporate law to enable directors ". . . to manipulate corporate affairs . . ." (Pet. 13), which assumes in the reader a comprehensive ignorance of the lower Courts' decisions.

True, the Courts below did not base their decisions on "peculiar vagaries of Wisconsin law relating to fiduciary

duties" (Pet. 13), because the Courts below found that defendants do not have the specific fiduciary duties alleged by petitioner. GB&W is neither insolvent nor in bankruptcy as were the corporations in Burroughs v. Fields, 546 F.2d 215 (7th Cir. 1976), and Malloy v. Korf, 352 F.Supp. 569 (E.D. Wis. 1972), cited by petitioner, and corporate directors have fiduciary duties to creditors only when the corporation is insolvent.

McGivern v. Amasa Lumber Co., 77 Wis. 2d 241, 252 N.W.2d 371 (1977).

The duties of corporate directors to the corporation's securities holders regarding the assets and revenue of the corporation are exclusively matters of state law as this and the lower Courts held in Williams v. Green Bay & W. R. Co., 59 F. Supp. 98, 99 (S.D.N.Y. 1944),

147 F.2d 777, 779 (1945), 326 U.S. 549, 553, 90 L. Ed. 311, 314 (1945). The petitioner can scarcely have overlooked that authority, having cited and argued it eight times on pages 4, 5 and 8 of his petition.

The petitioner's request for review to clarify general principles of corporate law (Pet. 14), sounds more like a letter to a publisher suggesting new titles for his 1983-1984 catalogue of offerings than a petition involving the jurisdiction of this Court. This and the other grounds advanced by the petition are patently frivolous, evidently asserted to delay the copending action of class members Drexler et al. who are represented by the same attorney. (See Pet. 8)

This petition fits Supreme Court Rule 49.2 which provides an award of

appropriate damages when a ". . . petition for writ of certiorari is frivolous . . ."

By motion submitted herewith, respondents request award of costs including actual attorneys fees as damages.

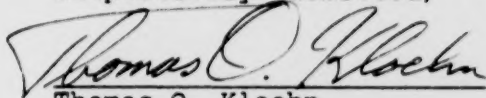
CONCLUSION

Petitioner's transparent efforts to camouflage the nature of the case, emphasize the fact that this petition fails to present any reasons for granting certiorari that even colorably satisfy Supreme Court Rule 17. No question of federal law is presented. Not even a question of state law is presented. The petition only offers the possibility of a harmless error of fact and an opportunity to write a textbook on corporate law. The petition should be denied, and respondents awarded their costs and actual attorney's

fees as damages pursuant to Supreme Court
Rule 49.2.

August 10, 1983.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Thomas O. Kloehn", is written over a horizontal line.

Thomas O. Kloehn
780 N. Water St.
Milwaukee WI 53202
(414) 277-5000
Counsel for Respondents

Of Counsel:
Charles A. Grube
780 N. Water St.
Milwaukee WI 53202
(414) 277-5000

TOK7:C

APPENDIX

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AMENDED COMPLAINT

(Biltchik case)

AMENDED COMPLAINT
(Title Omitted)

Plaintiffs as above set forth, by their attorney, Marvin L. Kohner, respectfully show the Court and allege:

25 1. That the defendant, Green Bay and Western Railroad Company, hereinafter referred to as the corporation, is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, engaged in the business of operating a railroad, and with an office located at Green Bay, Wisconsin.

2. That the defendant company at all times hereinafter mentioned, had a board of directors; and that the present board of directors is composed of five members, namely, C. Ledyard Blair, Charles W. Cox, Robert Winthrop, H. E. McGee, and Richard B. Wilson, the individual defendants named herein.

3. That the authorized capital stock of the defendant corporation consists of 25,000 shares

of common stock of the par value of \$100 each for a total of \$2,500,000, all of which has been outstanding since 1896.

4. That in the year 1896 the defendant corporation, for value, also issued the following debentures, all of which are still outstanding: \$600,000 principal amount of Class A Debentures, consisting of 600 Debentures with a principal amount of \$1,000 each, and \$7,000,000 principal amount Class B Debentures, consisting of 7,000 Debentures with a principal amount of \$1,000 each.

26 5. That Aaron L. Biltchik, one of the plaintiffs herein, is a resident of New York City, N.Y., and is the owner and holder of eight (8) of said Class B Debentures of the defendant corporation of the par amount of \$1,000 each, making a total of \$8,000 par value; and that the plaintiff, Florence W. Brill, is the owner of ten (10) of said Class B Debentures of the par amount of \$1,000 each, making a total of \$10,000 par amount of her holdings, and that the said Florence W. Brill is also a resident of New York City, N.Y.

6. That each of the Class B Debentures issued by the corporation contains the covenant that until the payment of the said debentures the holders thereof "shall in lieu of interest thereon participate in the distribution of the annual income to the following extent only, viz—So much of the annual net earnings of the said Company in any year as would be applicable

to the payment of dividends on stock shall be applied as follows, viz—To the holders of Class A Debentures $2\frac{1}{2}$ per cent upon the face value thereof, or if such annual earnings are insufficient for the payment of the same, then all of such net earnings shall be distributed pro rata among holders of said Class A Debentures. After the payment of $2\frac{1}{2}$ per cent upon the face value of Class A Debentures, the stockholders of the Company are entitled to receive the balance of such net earnings until $2\frac{1}{2}$ per cent shall have been paid out of the same upon the par value of the said stock, and all surplus net earnings then remaining shall be paid to the holders of Class A Debentures and of the stock pro rata, until five per cent shall have been paid upon the face value of said debentures and upon the par of stock for such year, and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata."

27 7. That a true and correct copy of said Class B Debenture is annexed hereto, marked Exhibit A, and is made a part hereof as though pleaded.

8. That for the years 1943 and 1944 and for a number of years prior thereto, the Corporation had annual net income and annual net earnings in excess of the amounts distributable to the holders of the Class A Debentures and of the Common Stock under the provisions of the Class B Debentures.

9. That for each of the following years the net income or net earnings of the corporation, after deducting amounts payable to the holders of the Class A Debentures and the Common Stock was:

27	1897	Nothing	1918	\$ 53,556.37
	1898	"	1919	18,758.19
	1899	"	1920	63,462.46
	1900	"	1921	77,648.41
	1901	"	1922	17,500.00
	1902	"	1923	17,874.00
	1903	\$53,288.43	1924	42,883.57
	1904	50,586.64	1925	39,964.16
	1905	36,913.11	1926	37,795.67
	1906	60,894.35	1927	64,592.97
	1907	49,576.73	1928	74,278.75
	1908	27,037.09	1929	80,211.65
	1909	17,910.18	1930	90,491.57
	1910	22,099.59	1931	25,482.28
	1911	42,820.43	1932	Nothing
	1912	93,233.89	1933	"
	1913	48,882.09	1934	"
	1914	56,169.09	1935	16,161.66
	1915	52,532.79	1936	87,763.66
	1916	85,973.21	1937	153,110.51
	1917	17,140.03	1938	18,017.64
		1939	\$ 88,505.48	
		1940	98,497.69	
		1941	146,165.54	
		1942	149,250.05	
		1943	443,468.68	

10. That the directors of the corporation have failed, neglected and refused to fix and declare as payable, and defendant corporation has failed to pay the sums as set forth in para-

graph "9" hereof to the B Debenture holders, except that the directors did fix and declare as payable, and the corporation did pay to the B Debenture holders the following sums for the following years:

	1897	Nothing	1923	\$ 17,500.00
	1898	"	1924	35,000.00
	1899	"	1925	35,000.00
	1900	"	1926	35,000.00
	1901	"	1927	35,000.00
	1902	"	1928	70,000.00
	1903	"	1929	70,000.00
	1904	"	1930	70,000.00
	1905	"	1931	Nothing
	1906	"	1932	"
28	1907	\$35,000.00	1933	"
	1908	26,250.00	1934	"
	1909	17,500.00	1935	"
	1910	35,000.00	1936	70,000.00
	1911	35,000.00	1937	105,000.00
	1912	87,500.00	1938	Nothing
	1913	43,750.00	1939	35,000.00
	1914	52,500.00	1940	35,000.00
	1915	43,750.00	1941	70,000.00
	1916	70,000.00	1942	70,000.00
	1917	8,750.00	1943	105,000.00
	1918	8,750.00		
	1919	8,750.00		
	1920	8,750.00		
	1921	35,000.00		
	1922	17,500.00		

11. That there is due and owing from the defendant corporation to plaintiffs and to all other holders of the Class B Debentures of the corporation the difference between the amounts

set forth in paragraph "9" hereof and the amounts set forth in paragraph "10" hereof, amounting in all to \$1,299,248.61 which is equivalent to \$175.61 for each \$1,000 Debenture; and, in addition, the amounts which they are entitled to receive out of the earnings of the corporation for the year 1944 as herein-after alleged.

12. Upon information and belief, that the directors of defendant corporation, the individual defendants herein, have failed, neglected and refused to fix and declare the true, full, correct and proper amount payable upon the Class B Debentures out of the net earnings of the Corporation for the year 1944, but instead have fixed and declared that the amount payable on said Class B Debentures out of the net earnings for the year 1944 is only \$5.00 per \$1,000 Debenture, although upon information and belief, the earnings of the Corporation for said year after deducting amounts payable to the holders of the Class A Debentures and Common Stock were in excess of such amount.
- 29

13. Upon information and belief, that the 7,000 Class B Debentures of the corporation are owned and held by a large number of persons, and that such Debentures are frequently bought and sold on the security markets, and that the question in this action is one of common or general interest to all owners and holders of such debentures and it would be impracticable to bring them all before the Court.

Plaintiffs therefore, bring this action for the benefit of all holders of said Class B Debentures of the corporation.

29 14. That prior to the commencement of this action a holder of Class B Debentures on his behalf and on behalf of all other holders of Class B Debentures duly demanded of the defendant corporation and of the individual defendants herein a proper accounting of the net earnings of the corporation for the year 1943 and for all prior years, and also that the defendants make a pro rata payment to the Class B Debenture holders of the full amount of such net earnings as provided in said Class B Debentures; but defendants have altogether failed, neglected and refused to comply with said demand, and any further demand upon said defendants would be futile and unavailing.

Wherefore, plaintiffs demand judgment herein as follows:

A. Directing the individual defendants herein, who are directors of the corporation, to fix and declare, and the corporation to pay, pro rata to the plaintiffs and all other holders of Class B Debentures the sum of \$1,229,248.61 plus such amount as the court may find to be due and owing for the year 1944.

B. That plaintiffs be awarded such sums as the Court may deem proper for their costs, expenses, disbursements and counsel fees for their attorneys.

Ex. 1

C. For such other and further relief as the Court may deem equitable and proper in the premises.

30

Marvin L. Kohner,
Plaintiffs' Attorney.
(Of Counsel, omitted)

EXHIBIT A

United States of America
Green Bay and Western Railroad Company

CLASS B

DEBENTURE

33

The Green Bay and Western Railroad Company hereby certifies that this is one of a series of Seven thousand of its Class B Debentures in the sum of ONE THOUSAND DOLLARS each aggregating in all the sum of Seven Million Dollars, which sum of One Thousand Dollars will be payable to the bearer hereof, or if registered to the person appearing on the books of the said Company as the last registered owner hereof, only in the event of a sale or reorganization of the railroad and property of said Company, and then only out of any net proceeds of such sale or reorganization which may remain after payment of any liens and charges upon such railroad or property, and after payment of Six hundred thousand Dollars to the holders of a series of debentures known as Class A, issued or to be issued by said Company, and the

sum of Two Million, five hundred Thousand Dollars to and among the stockholders of said Company. Any such net proceeds remaining after such payments shall be distributed pro rata to and among the holders of this series of Class B. Debentures. The said Railroad Company Hereby Covenants and Agrees that no mortgage shall at any time be placed upon its railroad and other property, nor shall the same be leased or sold without the consent of the holders of seventy-five percent of the capital stock outstanding at the time of such mortgage lease or sale. The said Railroad Company Hereby Agrees that until such payment, the holders of this Series of Debentures shall in lieu of interest thereon participate in the distribution of annual net income to the following extent, viz:—So much of the annual net earnings of the said Company in any year as would be applicable to the payment of dividends on stock shall be applied as follows, viz:—To the holders of Class A Debentures $2\frac{1}{2}$ percent upon the face value thereof, or if such annual net earnings are insufficient for the payment of the same, then all such net earnings shall be distributed pro rata among the holders of said Class A Debentures. After the payment of $2\frac{1}{2}$ percent upon the face value of Class A Debentures, the stockholders of the Company are entitled to receive the balance of such net earnings until $2\frac{1}{2}$ percent shall have been paid out of the same upon the par value of said stock, and all surplus net earnings then remaining shall be paid to the

35

holders of Class A Debentures and of the stock pro rata until five percent shall have been paid upon the face value of said debentures and upon the par of said stock for such year, and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata. None of such payments shall be cumulative. The amounts, if any, payable upon this series of debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when so declared, any amount payable hereon will be paid at the office or agency of the Company in the City of New York on or before the first day of March, in such year to the holder of this debenture, upon its production at such office or agency in order that such payment may be stamped hereon; or, if registered, payment will be made by check mailed to the person appearing on the books of this company as the registered owner hereof at the last address furnished by him to this company. This debenture shall pass by delivery unless registered on the books of the Company at its office or agency in the City of New York, and when so registered, and registry noted hereon, title thereto shall pass only by assignment executed by the last registered owner and noted on such register. This instrument shall not be valid for any purpose unless authenticated by the signature of the Farmers' Loan and Trust Company to the certificate endorsed hereon.

In Witness Whereof the said Green Bay and Western Railroad Company has caused these presents to be duly executed under its corporate seal at the City of Green Bay this first day of July, 1896.

Green Bay and Western Railroad Company
(Seal)

By.....

By: S. S. PALMER, President

Attest: MARK T. COX, Secretary.

35

AUTHENTICATION

The Farmers' Loan and Trust Co. hereby certifies that this is one of a series of 7000 Class B Debentures of \$1,000 each issued by the Green Bay and Western Railroad Company as herein set forth.

The Farmers' Loan and Trust Co.

By: William H. Leupp,
Vice-President.

ANSWER OF CORPORATION

(Biltchik case)

ANSWER OF CORPORATION*(Title Omitted)*

40 The defendant, Green Bay and Western Railroad Company, hereinafter referred to as the "Railroad Company", by its attorneys, North, Bie, Duquaine, Welsh & Trowbridge, answering the amended complaint herein, shows to the Court:

1. Admits each and every allegation set forth in paragraphs numbered "1", "2" and "3" of the amended complaint herein.

2. Denies each and every allegation set forth in paragraph numbered "4" of the amended complaint herein except that defendant admits that the securities described in said paragraph numbered "4" were duly issued by the Railroad Company in connection with a plan of reorganization referred to in paragraph 15 hereof, and that said securities are still outstanding.

3. Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph numbered "5" of the amended complaint herein.

4. Admits each and every allegation contained in paragraph numbered "6" of the amended complaint herein but respectfully refers the Court to the Class B Debentures of which the quoted material is merely a part for the exact terms, provisions and conditions of the entire instrument.

41 5. Denies each and every allegation contained in paragraph numbered "7" of the amended complaint herein.

6. Denies each and every allegation contained in paragraphs numbered "8" and "9" of the amended complaint.

7. Denies each and every allegation contained in paragraph numbered "10" of the

amended complaint herein, except that it admits that the Directors did fix and declare as payable and the Railroad Company did pay to the holders of Class B Debentures the sums mentioned in that paragraph and for the years therein mentioned.

41 8. Denies each and every allegation contained in paragraphs numbered "11" and "12" of the amended complaint.

9. Admits each and every allegation contained in paragraph numbered "13" of the amended complaint herein.

10. Denies each and every allegation contained in paragraph numbered "14" of the amended complaint herein.

AS AND FOR A FIRST SEPARATE
DEFENSE, THE DEFENDANT
ALLEGES:

11. That the cause of action alleged in the amended complaint as to the net income, net earnings of the Railroad Company and the moneys claimed by the plaintiffs for the year 1934 and all of the years prior thereto did not accrue within ten years from the time of the commencement of this action and that the said cause of action is barred by Section 330.18, subdivisions 2 and 4, of the Statutes of this State.

**AS AND FOR A SECOND SEPARATE
DEFENSE, THE DEFENDANT
ALLEGES:**

- 42 12. That the cause of action alleged in the amended complaint as to the net income, net earnings of the Railroad Company and the money claimed by the plaintiffs for the year 1924 and all of the years prior thereto did not accrue within twenty years from the time of the commencement of this action and that the said cause of action is barred by Section 330.16, subdivision 2, of the Statutes of this State.

**AS AND FOR A THIRD SEPARATE
DEFENSE, THE DEFENDANT
ALLEGES:**

13. Upon information and belief that the plaintiffs and their predecessors in interest and in title had full knowledge of all of the matters complained of and have delayed the bringing of this action for many years and that during those years the Railroad Company has followed practices and customs pertaining to the use and distribution of its earnings which have been acquiesced in by the plaintiffs and their said predecessors and that the granting of the relief sought by the plaintiffs would be inequitable.

**AS AND FOR A FOURTH SEPARATE
DEFENSE, THE DEFENDANT
ALLEGES:**

14. That the plaintiffs and their predecessors in interest and in title with full knowledge of

the matters now complained of and set forth in the amended complaint, have, during the period of many years, received, acquired, accepted and retained distributions of income under the Class B Debentures, when and as declared by the Board of Directors of the Railroad Company and have ratified the action of the said Board and are now estopped from making the claims set forth in their alleged cause of action.

**AS AND FOR A FIFTH SEPARATE
DEFENSE, THE DEFENDANT
ALLEGES:**

- 43 15. That at all the times mentioned in the amended complaint herein, the defendant Railroad Company has been and now is a common carrier, owning and operating lines of railroad entirely within the State of Wisconsin; that the said Class B Debentures were issued by the Railroad Company in 1896 in connection with a plan of reorganization, following foreclosure, pursuant to which the railroads, properties, rights, powers, privileges and franchises of the Green Bay, Winona & St. Paul Railway Company and the Green Bay, Stevens Point and Northern Railway Company were sold under decrees of foreclosure and sale rendered by the Circuit Court of the United States in and for the Eastern District of Wisconsin and, subsequently, as a part of said plan of reorganization, acquired by the Railroad Company in exchange for all of its securities; that in said plan of re-

organization the Common Stock of the Railroad Company was issued to holders of senior mortgage securities of the predecessor companies and the Class B Debentures were issued to holders of junior securities without consideration except the surrender of such junior securities; that any and all annual net income otherwise available for distribution to Class B Debenture holders in any year mentioned in the amended complaint, in excess of such income as was actually so distributed in such year, was in fact and in the judgment of the Board of Directors of the Railroad Company, necessary to said Company in order to provide for the current and prospective maintenance of its engines, cars, tracks and other equipment in such condition as adequately to accommodate the public and for the safe, adequate and efficient transportation and handling of passengers and freight, as was and is required of the Railroad Company by the laws, statutes and public policy of the State of Wisconsin, and of the United States; that any portion of net income not distributed and retained was due solely to said necessity and to the judgment of said Directors that the said necessity existed; that under the correct construction of said Class B Debentures, said Directors were neither required nor entitled to declare, or said Railroad Company to make, any distribution to Debenture holders of net income necessary to the Railroad Company for the above-mentioned purposes; and that any contrary construction of said Debentures, the

applicable provisions of said Debentures themselves if so construed, and any decree or relief sought by the plaintiffs herein based upon such a construction, are and would be against public policy, illegal and void.

44 Dated, Green Bay, Wisconsin, August, 1945.

North, Bie, Duquaine, Welsh & Trowbridge,
Attorneys for Defendant,
Green Bay & Western Railroad Company,
Suite 509, Bellin Building,
Green Bay, Wisconsin.

ANSWER OF DIRECTORS

(Title Omitted)

The defendants, C. Ledyard Blair, Charles W. Cox, Robert Winthrop, H. E. McGee and Richard B. Wilson, severally and each for himself, by his attorneys, North, Bie, Duquaine, Welsh & Trowbridge, answering the amended complaint herein, shows to the Court:

Repeats, realleges, adopts, and incorporates herein paragraphs "1" to "15", both inclusive, of the Answer of defendant herein, Green Bay & Western Railroad Company, filed herein in the office of the Clerk of the Circuit Court for Brown County, Wisconsin, on or about the day of August, 1945, with the same force and effect as if set forth *in extenso* and as if all admissions, allegations and denials therein made by said Green Bay & Western Railroad Com

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Exhibit

pany were here separately made as and by these defendants, and as if all allegations and separate defenses therein made by said Green Bay & Western Railroad Company were here separately alleged and made as and by these defendants.

Wherefore, defendants demand judgment dismissing the said amended complaint herein on the merits with costs.

North, Bie, Duquaine, Welsh & Trowbridge,
Attorneys for Defendants,
C. Ledyard Blair, Charles W. Cox, Robert
Winthrop, E. H. McGee and Richard B.
Wilson,
Office and Post Office Address:
Suite 509, Bellin Building,
Green Bay, Wisconsin.

DECISION

(Biltchik case)

APPENDIX**DECISION***(Title Omitted)*

52 This action was heard in the Brown County Circuit Court, Honorable Henry Graass presiding. The testimony was transcribed by the official reporter and briefs were submitted, but before a decision was made and filed by Judge Graass he was killed in an automobile accident on March 8, 1946. The parties, through their respective attorneys, agreed to submit the case for decision upon the record, consisting of the transcribed testimony and the exhibits, upon the briefs heretofore filed before Judge Graass.

The plaintiffs, Aaron L. Biltchik and Florence W. Brill, are holders of Class B Debentures of the defendant Green Bay & Western Railroad Company, and they sue as individual security holders and on behalf of all other holders of the same securities. It is a representative action, and no other holders of the same class of securities have intervened in the action. The individuals named as defendants are the directors of the defendant railroad company.

The plaintiffs demand judgment directing the defendant directors "to fix and declare, and THE RAILROAD COMPANY to pay pro rata to the plaintiffs and all other holders of Class B Debentures the sum of \$825,856.50 plus such amount as the Court may find to be due and

owing for the year 1944," the said sum being the alleged "annual net income and annual net earnings of the railroad company, in excess of the amounts distributable to the holders of the Class A Debentures and of the common stock, for the years from 1924 to 1944, both inclusive."

53 Upon the trial the late Honorable Henry Graass, presiding circuit judge, held that the twenty-year statute of limitations was applicable, thereby limiting the claim to the period from 1924 to 1944, inclusive.

The defense of laches, and likewise estoppel, interposed by the defendant is not tenable. The lapse of time, which in itself cannot support the defense of laches, is not available unless it has worked irreparable injury to the defendant, and there is a failure to establish any injury or prejudice of the defendant by the lapse of time. At least two previous actions by holders of Class B Debentures have been instituted and maintained to a decision. The instant plaintiffs purchased their securities a comparatively short time ago, and certainly they have acted with dispatch. There can be no claim that the defendant railroad company ever changed its position in reliance upon any conduct of the plaintiffs as a class to the defendant's damage.

A plan of reorganization of the predecessor company, adopted in the year 1896, and, which brought into existence a new company, the defendant railroad company, followed on the heels

of a foreclosure action in the Federal District Court of Wisconsin. The sum of \$600,000.00, new money, was raised and the defendant railroad company took over the assets of its predecessor after the foreclosure. The capital structure after reorganization was as follows:

Class A income debentures, \$600,000.00.

Common stock, \$2,500,000.00.

Class B debentures, \$700,000.00.

- 54 No actual cash was paid by anyone for any of the Class B debentures, and under the plan of reorganization the total of seven million dollars of Class B debentures were distributed as follows: About two million two hundred twenty thousand to the holders of the old second mortgage bonds, amounting to three million seven hundred eighty-one thousand, and about three million seven hundred eighty thousand to the holders of the old common and preferred stock.

The foreclosure action would have wiped out completely the holders of the old junior securities, and the reorganization resulted in the issuance to such junior security holders the Class B debentures under consideration and involved in this case. The record discloses that for fourteen years no income had been paid on the old junior securities before the foreclosure. The reason for the unusual provisions in the Class B Debentures, therefore, becomes crystal clear. It was not only expedient but absolutely necessary that the Class B debentures, which were income bonds, should contain drastic restrictions as to

payment of income, and that they be definitely and even arbitrarily subordinated to the holders of Class A debentures and common stockholders in the new company. The precarious condition of the company required the provision that "only in the event of a sale or reorganization of the company" would the Class B debentures be paid on the principal or face amount of the debenture; and for the same understandable reason there was no maturity date in the Class B securities.

55 The Class B debentures bearing the face value of one thousand dollars were, with the other securities of the company immediately after reorganization, listed for sale on the New York Stock Exchange. The plaintiffs in this action, Biltchik and Brill, comparatively recently purchased on the open market Class B debentures for \$120.00.

Annual reports of the railroad company showing receipts and disbursements of income and the amounts paid to security holders, and the general financial condition, were filed in the offices of the Interstate Commerce Commission, Washington, D. C., The Wisconsin Public Service Commission, Madison, Wisconsin, The Securities and Exchange Commission, both in Washington and Philadelphia, and the New York Stock Exchange in New York. The plaintiffs in no manner dispute or criticize any item in any of the reports as to the financial condition as filed.

55 This action is brought to recover the balance due on interest to the Class B debenture holders upon a covenant contained in the debentures which in material part reads as follows:

" * * * the holders * * * shall in lieu of interest thereon participate in the distribution of annual net income to the following extent only, viz:— So much of the annual net earnings in any year as would be applicable to the payment of dividends on stock shall be applied as follows (five percent upon the face value of the Class Debentures and on the par value of the common stock) and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata. None of such payments shall be cumulative. The amounts, if any, payable on this series of Debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when so declared, any amount payable hereon will be paid * * * . "

The defendant railroad company after reorganization acquired title of its predecessor to a railroad whose tangible assets were listed at a value of \$10,100,000.00. The defendant company in recent years has made a considerable profit and is operating a modern, prosperous railroad with unmortgaged assets of \$13,760,000.00 and liabilities of \$560,000.00, exclusive of Class A and B Debentures and common stock. Exhibit seven, which is the financial statement

ust referred to, shows that the assets exceed all liabilities, including Debentures in capital stock, by \$3,100,000.00.

56 The plaintiffs contend that such excess net income, by virtue of the provisions of the Class B. Debentures, must be paid to them, and that the payment in essence is only a ministerial act but, by reason of the net earnings of the company, require that the same be paid to them and that the directors have no right to withhold payment nor to exercise any discretion in the matter.

The directors annually have by proper resolution authorized payments to the various classes of securities, and at various times the holders of Class B Debentures have been paid amounts representing one-half of one per cent, one per cent, and one and one-half per cent of the face of the Debenture.

The defendants maintain that the net earnings or income is not payable to Class B Debenture holders until the directors in the proper exercise of their discretion declare that it shall be paid. The directors have not declared it to be payable, and this action is brought to compel the directors to do so.

The directors have pursued a policy of using the income for betterments and improvements which, they assert, are necessary for the proper maintenance of a modern railroad in competition with other railroads of the same class, and that such policy is in the public interest.

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The testimony of the present executives of the company, which is undisputed, makes clear the position of the company with reference to net earnings or excess income, and it is undoubtedly their sound judgment and policy of plowing back part of the income that has kept the defendant railroad company in a favorable competing position with other railroads. The position of the executives of the railroad company that to insure the maintenance of the present earning power there must continuously be replacement of obsolete and outmoded equipment, and that replacement costs of this more efficient equipment, in addition to depreciation, is a heavy burden which must be borne to hold its competitive position in the industry, seems sound and not subject to constructive criticism.

The specific language of the Class B Debenture has already been interpreted and, I believe, the claims of the plaintiffs herein adjudicated in *Williams vs. Green Bay & Western Railroad Company*, 147 Fed. (2d) 777, Circuit Court of Appeals, and a decision in the same case by the United States Supreme Court as of January 7, 1946, and the case of *Green Bay & Western Railroad Company vs. Commissioner of Internal Revenue*, 147 Fed. (2d) 585, Circuit Court of Appeals, Seventh District.

The Court in *New York * * * Railroad Company vs. Nickals*, 119 U. S. 296, in construing the provisions of preferred stock as to the payment of dividends upheld the theory that the payment

of dividends was a matter vested in the discretion of the Board of Directors, and even though dividends were earned they were not payable until declared to be payable by the Board of Directors. The Nickals case, I believe, directly rules and settles the issues in the instant case.

58 There is no claim nor showing of bad faith on the part of the Directors, and, in the absence of such showing, then the Board of Directors cannot by this type of action be compelled to pay the holders of Class B Debentures. The exercise of the discretion on the part of the Directors in withholding payment is amply justified by the application of sound business principles; and the holders of Class B Debentures must see what is obvious to anyone, that their equities in the defendant railroad company are constantly being increased and that the earnings of the company will eventually enure to their benefit.

The complaint of the plaintiffs is dismissed on its merits and defendants shall recover from the plaintiffs their actual disbursements, to be settled by the Court upon failure of agreement as to amount, and no taxable costs allowed.

Dated: April 24, 1946.

By the Court:

Arold F. Murphy,
Circuit Judge.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

(Biltchik case)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW*(Title Omitted)*

59 At a regular term of court aforesaid begun and held in the City of Green Bay on the 16th day of January and continuing in session to this date. Present, Honorable Henry Graas and Honorable Arold F. Murphy, Circuit Judges presiding.

This action coming on for trial before the court without a jury, Honorable Henry Graas, deceased, presiding, plaintiffs appearing by their attorneys, Geist & Netter and Marvin L. Kohner, defendants appearing by their attorneys, North, Bie, Dequaine, Welsh & Trowbridge and Cadwalader, Wickersham & Taft, said Judge Graas having heard the testimony, arguments of counsel and then having died, and the parties having stipulated that I, said Arold F. Murphy, do consider and decide said case, and after considering the testimony, examining the briefs and being advised on the premises, do make the following:

Findings of Fact

1. That the defendant, Green Bay and Western Railroad Company, is and at all times since June 1896 has been a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, engaged in the business of operating a railroad, and with an office located at Green Bay, Wisconsin.

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2. That the said defendant since June 1896 has had a board of directors and that the present board of directors is composed of five members, namely: C. Ledyard Blair, Charles W. Cox, Robert Winthrop, H. E. McGee and Richard B. Wilson, the individual defendants hereinabove named.

3. That the authorized capital stock of the defendant corporation consists of 25,000 shares of Common Stock of the par value of \$100 each for a total of \$2,500,000, all of which has been outstanding since 1896.

4. That since 1896 the defendant corporation has been and now is a common carrier owning and operating lines of railroad in Wisconsin and partly in Minnesota.

5. That in the year 1896 the defendant corporation issued the following Debentures, all of which are still outstanding, to-wit: \$600,000 principal amount of Class A Debentures, consisting of 600 Debentures with a principal amount of \$1,000 each, and \$7,000.00 principal amount of Class B Debentures consisting of 7,000 Debentures with a principal amount of \$1,000 each.

6. That annexed hereto are copies of the said Class A Debentures and the Class B Debentures.

7. That the said Class B Debentures were issued by the defendant corporation in 1896 in connection with a plan of reorganization, following foreclosure, pursuant to which the rail-

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Record

road's properties, right, powers, privileges and franchises of the Green Bay, Winona & St. Paul Railway Company and the Green Bay, Stevens Point and Northern Railway Company were sold under decrees of foreclosure and sale rendered by the Circuit Court of the United States in and for the Eastern District of Wisconsin, and subsequently, as a part of said plan of reorganization, acquired by the defendant corporation for all of its securities.

61 8. That in the said plan of reorganization the common stock of the defendant corporation was issued to the holders of senior mortgage securities of the predecessor companies and that the aforesaid Class B Debentures were issued to the holders of junior securities of said predecessor companies without consideration except the surrender of such junior securities and that the Class A Debentures were issued for cash supplied by those who received the Class A Debentures.

9. That during the years 1924 to 1944, both inclusive, the Board of Directors of the defendant corporation by resolutions fixed and declared payments on the Class B Debentures, ranging from one-half to one and one-half percent of their face value and at no time for a fraction of a percent less than one-half.

10. That each of the said payments when made was stamped on the reverse side of such Class B Debentures.

11. That annual reports showing the receipts, disbursements, of income of the defendant cor-

poration and the amount paid to the security holders were filed in the offices of the Interstate Commerce Commission in Washington. The Wisconsin Public Service Commission at Madison, the Securities and Exchange Commission and the New York Stock Exchange, and that no objections to the said reports were ever made by the plaintiffs or their predecessors in interest.

62 12. That all of the income of the defendant corporation for the years 1924 to 1944 inclusive, other than the sums allocated and paid to the security holders, was used and necessarily used in the public interest for additions and for the betterment for the defendant's railroad and to properly and adequately serve the public, to meet competition and in the best interest of the security holders.

13. That the equity of the holders of the Class B Debentures has been increased during the years 1924 to 1944 inclusive by the application of the said income to betterments and additions to the extent of more than \$2,000,000.

14. That the plaintiffs are the owners of Class B Debentures of the face value of \$18,000 and that they purchased them between April 7, 1943 and November 28, 1944, shortly prior to the commencement of this action, when the market value was approximately \$120. per Debenture, having a face value of \$1,000 and that their annual return exceeded five percent of their investment.

15. That the said Class B Debentures are owned and held by a large number of persons

and that such Debentures are frequently bought and sold on the security markets and that the question in the action is one of common or general interest to all owners and holders of such Debentures and that it was impracticable to bring them all before this Court and that the plaintiffs brought this action for the benefit of all holders of the said Class B Debentures.

62 16. That prior to the commencement of this action, the plaintiffs on behalf of themselves and all other holders of the said Class B Debentures duly demanded of the defendants a proper accounting of the net earnings of the defendant, corporation for the year 1943 and for all prior years and also demanded that the defendants make a pro-rata payment to the Class B Debenture holders of all of the net earnings of the defendant corporation and the defendants have refused to comply with the said demand and that any further demand is unnecessary.

17. That the plaintiffs and their predecessors in interest and in title had full knowledge or were chargeable with full knowledge of all of the matters complained of and the defendants have consistently followed a uniform custom and practice pertaining to the use and distribution of the earnings of the defendant corporation.

63 18. That the plaintiffs and their predecessors in interest and in title with full knowledge of the matters complained of and set forth in the

amended complaint herein have, during the period of many years, received, acquired, accepted and retained distributions of income under the Class B Debentures when and as declared by the Board of Directors of the defendant and have ratified the action of the said Board.

19. That the Board of Directors have not fixed and declared the amount claimed in the amended complaint, or any part thereof, to be payable to or distributable to the holders of the Class B Debentures.

Conclusions of Law

64 1. That the Class B Debentures of the defendant corporation are hereby construed to mean that none of the income or earnings of the defendant corporation is payable to or distributable to the holders of such Debentures unless and until the Board of Directors of the defendant corporation, in their discretion, so declare by resolution.

2. That the mere ascertainment that the said defendant corporation has income or earnings does not entitle the Class B Debenture holders thereto or any part thereof.

3. That the cause of action alleged in the amended complaint as to the net income, net earnings of the defendant corporation and the moneys claimed by the plaintiffs for the years 1924 and all of the years prior thereto did not

accrue within twenty years from the time of the commencement of this action and that the said cause of action is barred by Section 330.161 subdivision 2, of the Statutes of this State.

64 4. That the Board of Directors of the defendant corporation properly and legally exercised its discretion under the terms of the Class B Debentures in disposing of the income and earnings of the defendant corporation for the years 1924 to 1944 both inclusive.

5. That the plaintiffs and the Class B Debenture holders have no legal or valid claim against the defendants or any of them for the income or earnings of the defendant corporation or any of them.

6. That judgment shall be entered herein dismissing the amended complaint upon its merits.

7. That the original parties to the said Class B Debentures and their successors in interest and in title, including the parties to this action, at all of the times mentioned in the amended complaint have construed and enforced the said Class B Debentures by a consistent and uniform course of conduct so as to give them the meaning that the income or earnings of the defendant corporation were not and are not payable or distributable to the holders of such Class B Debentures unless and until the Board of Directors of the said corporation, in their discretion, so declared or declare by resolution.

65 8. Defendants will recover from the plain-
tiffs their actual disbursements fixed in the sum
of \$25.00.

Dated: May 13, 1946.

By the Court:

Arold F. Murphy,
Circuit Judge.

AMENDED COMPLAINT

(Eliassen case)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

AXEL N. ELIASSEN,
on behalf of
himself and
all others similarly
situated,

Plaintiff,

v.

AMENDED COMPLAINT

GREEN BAY & WESTERN
RAILROAD COMPANY,
H. WELDON McGEE,
A. H. SCHAEFFER,
R.B. WILSON, JOHN
WINTHROP, CHARLES W.
COX II, and ITEL
CORPORATION,

Case No. 80-C-1092

Defendants.

THE PLAINTIFF, on behalf of
himself and all others similarly situated,
by his attorneys, Robert K. Steuer and
William J. Mantyh, states as follows:

JURISDICTIONAL ALLEGATIONS

1. The plaintiff is now and was at all times relevant hereto a citizen of the State of Illinois. The defendant Green Bay & Western Railroad Company (hereinafter "GB&W") is a Wisconsin corporation with its principal offices in the State of Wisconsin. The individual defendants H. Weldon McGee and A. H. Schaeffer are now and have been at all times relevant hereto citizens of the State of Wisconsin. The individual defendants R. B. Wilson, John Winthrop and Charles W. Cox II are all citizens of the State of New York. Defendant ITEL Corporation (hereinafter "ITEL") is now and has been at all times relevant hereto a corporation incorporated under the laws of the State of Delaware with its principal offices in the State of California. This

matter exceeds, exclusive of interest and costs, the sum of \$10,000.

2. The individual defendants herein are being sued by virtue of actions which arose out of their conduct as directors of GB&W and are, therefore, subject to the personal jurisdiction of the courts of the State of Wisconsin and of this court under the provisions of § 801.05(8), Stats. The defendant IteL is engaged in substantial and not isolated activities within the State of Wisconsin and is, therefore, subject to the personal jurisdiction of this court under the provision of § 801.05(1)(d), Stats.

DEFINITION OF CLASS

3. Plaintiff brings this action on behalf of himself and all holders of Class B debentures of GB&W as of November 28, 1977 similarly situated. The number of Class B debentures out-

standing as of that date was 6,376, and the plaintiff cannot, without conducting discovery, state the number of members of the class who meet the jurisdictional requirements of this Court, but plaintiff is able to state that it is impracticable to bring them all before the Court; there are questions of law and fact presented herein which are common to the entire class of persons holding Class B debentures of GB&W. The claims of the plaintiff herein are typical of the claims of the members of said class, and the plaintiff will fairly and adequately protect the interest of the class.

4. As of November 28, 1977 plaintiff was the holder of 59 of the Class B debentures of GB&W; plaintiff is presently the holder of 25 of said debentures.

CAPITAL STRUCTURE OF GB&W

5. GB&W was organized pursuant to the laws of the State of Wisconsin in 1896, in connection with a plan of reorganization of several predecessor railroads. As part of the plan of reorganization, the Articles of Incorporation provided for the issuance of certain securities as follows:

A. Two million, five hundred thousand dollars par value of instruments issued which have been known as "capital stock" in the par value of \$100 each; the holders of the "capital stock" have thereafter elected the members of the Board of Directors of GB&W.

B. Six hundred thousand dollars face value of instruments issued which have been known as Class A debentures in the amount of \$1,000 each. The

Articles of Incorporation provided that the Class A debentures should be repayable only:

" . . . in the event of any sale or reorganization of the railroad and property of said company, the net proceeds thereof, after payment of all liens and charges thereon, shall be distributed to and among the holders of said Class A Debentures and the capital stock pro rata, and until such payment the holders of such Debentures shall be entitled in lieu of interest thereon to receive out of the net earnings of the railroad in each year applicable to the payment of dividends of the stock two and one-half percent (2-1/2%) upon the face value of such debentures, if earned, and after payment of two and one-half percent (2-1/2%) dividend upon the said capital stock, to participate pro rata with the stock in the net earnings of the property for each year until five percent (5%) shall have been paid upon both the stock and the said Class A Debentures, . . . "

C. Seven million dollars face value of instruments issued which have been known as Class B debentures in the amount of \$1,000 each and:

" . . . payable only in the event of a sale or reorganization of the railroad and property of said company and then only out of any net proceeds of such sale or reorganization which may remain after payment of all liens and charges upon said railroad or property, and after payment of Six Hundred Thousand Dollars (\$600,000) to the holders of said Class A Debentures and Two Million Five Hundred Thousand Dollars (\$2,500,000) to the stockholders, any such net proceeds remaining after such payments to be distributed pro rata to and among the holders of said Class B Debentures, the holders thereof to be entitled to receive in lieu of interest thereon any net earnings of the railroad and property in each year remaining after payment of five percent (5%) upon the said Class B Debentures and the said stock."

D. From time to time prior to November 28, 1977, GB&W had repurchased and held as treasury shares substantial amounts of the above-described securities.

6. A prior action has been concluded between representatives of the holders of Class B debentures of GB&W and its then directors, which action asserted that the directors had a duty to make certain payments to the holders of the Class B debentures and was entitled Biltchik v. Green Bay & Western R.R. Co., 250 Wis. 177 (1947). Based upon the facts litigated therein, the Court concluded that the aforesaid Class A debentures were issued to the persons who advanced new money during the course of the railroad reorganization, the "capital stock" to the holders of first mortgage bonds in foreclosure at the time of the

reorganization, and the Class B debentures to the holders of second mortgage bonds and common and preferred stock of the old company. With respect thereto, the Court held:

"The scheme of reorganization was manifestly planned to assure that the holders of the subordinate securities should receive nothing whatever until the holders of the new Class A debentures and the new stock were compensated both through current income and on liquidation of the new corporation, and this must be borne in mind in construing the provisions of the Class B Debentures on which this suit is based" 250 Wis. at 180.

7. The Court further held, after consideration of the terms of the Class B debentures, that notwithstanding the names given to the securities in the Articles of Incorporation:

"This as to distribution on liquidation puts the holders of the Class B Debentures on the footing

of stockholders of an ordinary corporation. It makes them, instead of the stockholders, the owners of the equity of the corporation."

8. The Court further held that the directors of GB&W had properly exercised their discretion in refusing to make payments to the Class B debenture holders and applying the income of the corporation instead to the maintenance and improvements of the assets of the railroad and further stated:

"The improvements made had enabled the directors to pay at least something by way of income on the Class B Debentures while prior to making such improvements there had been no net income to apply to them, and the value of the equity of the owners of the Class B Debentures had been thereby increased over \$2,000,000 . . .

". . . As the earnings of the corporation were all in fact applied to proper purposes to the advantage

of the corporation and to the advantage of the owners of Class B Debentures, no harm or prejudice resulted to the latter" 250 Wis. 177-178.

9. In various other cases also involving the terms of the Class B debentures, the Courts have consistently held that the holders of the Class B debentures are, in fact, holders of the equity in GB&W and that the other securities are, in fact, debt securities. Williams v. Green Bay & Western R.R. Co., 326 U.S. 549, Sup. Ct. 284, 90 L. Ed. 311 (1946); Green Bay & Western R.R. Co. v. Commissioner, 147 F.2d 585 (7th Cir. 1945). By virtue of these decisions, the rights of the holders of the Class B debentures of GB&W are those of the holders of an equity security entitled to payment pro rata after payment of the outstanding par value of the "capital

stock" and Class A debentures of the company upon a sale of the assets of the company or a reorganization thereof as a matter of res judicata.

DUTIES OF THE DEFENDANTS

10. On November 28, 1977, the individual defendants constituted the board of directors of GB&W. The individual defendants, as directors of GB&W, owed to the holders of the Class B debentures of GB&W, who are the holders of the equity in said corporation, a duty of trust and loyalty to deal with the assets of GB&W and to manage its affairs for their benefit as fiduciaries.

11. In 1977, the defendant Itel commenced efforts to take over and control the assets and affairs of GB&W; shortly after November 28, 1977, the defendant Itel took over the management and control of GB&W, and, therefore owed

a duty of care to the holders of the Class B debentures of GB&W to manage its affairs for their benefit as a fiduciary.

THE BREACH OF DUTY

12. Prior to 1977, GB&W redeemed certain of its outstanding securities and on November 28, 1977, the following number of the three classes of securities of GB&W were outstanding and publicly held:

- A. Capital stock, 18,000 shares;
- B. Class A debentures, 3; and
- C. Class B debentures, 6,376.

13. The individual defendants and members of their families, as of November 28, 1977, owned about 6,800 shares of capital stock of GB&W, controlled some 1,200 additional shares then held in trust and, by proxy, had control of an additional 8,000 shares.

14. Between 1974 and 1977, other railroad companies and companies engaged in railroad equipment leasing operations, including Itel, made tender offers to acquire control of GB&W, either by means of a purchase of all of the assets of GB&W or by tendering offers to acquire the securities of GB&W. The individual defendants, prior to November, 1977, had favored at least one such prior tender offer.

15. After prior negotiations, on November 28, 1977 the defendant Itel submitted an offer to the defendant directors of GB&W to purchase the assets of GB&W in an amount which would have made available to the security holders thereof a total sum of \$8,500,000.

16. Upon acceptance of said offer, the proceeds of sale would have been distributable to the securities

holders of GB&W, in accordance with its Articles of Incorporation, as follows:

A. Capital stock - 18,000 shares at \$100 par value, a total of \$1,800,000;

B. Class A debentures - 3 at \$1,000 principal amount, a total of \$3,000; and

C. Class B debentures 6,376 in number, which would receive the balance of \$6,697,000 or approximately \$1,050 each.

17. All of said defendants knew that said offer was in the best interests of the holders of the Class B debentures of GB&W, and the individual defendants, being directors of GB&W, had a duty to the holders of the Class B debentures to obtain a distribution in said amount for their benefit.

18. The defendant directors, at the time said offer was submitted, had been informed and knew that in the event of their rejection of said offer Itel intended to submit an alternative offer to purchase the outstanding securities of GB&W, but upon payment of a greater sum to the holders of the capital stock, including themselves, but to the detriment of the holders of the Class B debentures.

19. The individual defendants breached their duty of trust and loyalty to the holders of the Class B debentures of GB&W and engaged in a course of self-dealing for the purpose of inflating the value of the shares of capital stock which they held. As a consequence of their dealings, they were able to sell the control of GB&W to Itel pursuant to said declared alternative offer and received therefrom \$330 per share for the

capital stock which they held, notwithstanding the face that said capital stock had a redemption value of \$100 per share.

20. Commencing on November 28, 1977 and continuing thereafter, the defendant Itel has effectuated a de facto reorganization of GB&W through its control thereof [sic] in conjunction with its control over other railroads. Said defendant has not, however, as required by the Articles of Incorporation of GB&W, paid the liquidation value of the Class B debentures of GB&W to the holders thereof in the amount of \$1,050, and has controlled the market for said securities at a deflated amount, offering no more than \$325 for each of said Class B debentures.

DAMAGES

21. The conduct of the individual defendants and of the defendant Itel since November, 1977 has constituted

a conspiracy whereby said defendants have utilized their control over GB&W for the purpose of benefitting themselves, as holders of the capital shares of GB&W, to the detriment of the holders of the Class B debentures of GB&W. Pursuant to said conspiracy, the individual defendants and the defendant IteI have effectuated a de facto reorganization of GB&W and have deprived the holders of the Class B debentures thereof of their benefit in receiving their pro rata share resulting from said reorganization.

22. The plaintiff, and each other holder of Class B debentures of GB&W as of November 28, 1977 has been damaged to the extent that the plaintiff and each member of the class was deprived of the opportunity to receive the liquidation amount of \$1,050 for each such debenture as of said date.

23. Since November 28, 1977, the assets of GB&W have been manipulated and wasted by the directors thereof, including the individual defendants and the directors controlled by the defendant Itel, and the acts of those in control of GB&W Have been illegal and fraudulent. Accordingly, GB&W should be liquidated either pursuant to the provisions of § 180.771(1)(a)2. and 3., Stats., pursuant to the Articles of Incorporation, or pursuant to the general equity powers of this Court and the assets applied in payment of the claims of the Class B debenture holders as of November 28, 1977.

WHEREFORE, plaintiff prays for relief as follows:

1. That an order be entered herein allowing this action to be maintained as a class action under the pro-

visions of Rule 23 of the Federal Rules of Civil Procedure by plaintiff on behalf of himself and on behalf of all holders of Class B debentures of the defendant Green Bay and Western Railroad Company as of November 28, 1977.

2. That judgment be entered in favor of said class and against the defendants H. Weldon McGee, A. H. Schaeffer, R. B. Wilson, John Winthrop, Charles W. Cox II and Itel Corporation in the sum of \$6,697,000 together with interest since November 28, 1977. That said judgment further provide that the assets of the defendant Green Bay and Western Railroad Company be liquidated to the extent necessary to create a fund in that amount.

3. That the defendants be held jointly and severally further liable for the costs and expenses of this action.

4. That the fund created as a result of the judgment entered in this Court be administered by the Court and such further orders be entered providing for the payment from said fund for the costs and expenses of this litigation and to the holders of the Class B debentures of the Green Bay and Western Railroad Company since November 28, 1977 as their respective interests may appear.

Robert K. Steuer and
William J. Mantyh,
Attorneys for Plaintiff

By:

Robert K. Steuer,
Weiss, Steuer, Berzowski
& Kriger
Suite 1550
700 North Water Street
Milwaukee, Wisconsin 53202
(414) 276-5800

57a

Co-Counsel:

William J. Mantyh
Honeck, Mantyh & Arndt
757 N. Broadway
Suite 515
Milwaukee, Wisconsin 53202
(414) 272-0084

TOK6:E

AMENDED ANSWER

(Eliassen case)

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WISCONSIN

AXEL N. ELIASSEN, on
behalf of
himself and all
others similarly
situated,

Plaintiff,

Civil Action No.
80-C-1092

v.

AMENDED ANSWER OF
GREEN BAY & WESTERN
RAILROAD COMPANY

GREEN BAY &
WESTERN RAILROAD
COMPANY, H. WELDON
McGEE, R. B. WILSON,
JOHN WINTHROP and
CHARLES W. COX II

Defendants.

Defendant Green Bay & Western
Railroad Company (GBW), by its attorneys
Quarles & Brady, for its answer to the
Amended Complaint herein:

1. Lacks knowledge or infor-
mation sufficient to form a belief as to
the truth and accuracy of the allegation

that the plaintiff is now and was at all times relevant hereto a citizen of the State of Illinois, admits that GBW is a Wisconsin corporation with its principal offices in the State of Wisconsin, lacks knowledge or information sufficient to form a belief as to the truth and accuracy of the allegation that the individual defendants H. Weldon McGee and A. H. Schaeffer are now and have been at all times relevant hereto citizens of the State of Wisconsin, lacks knowledge or information sufficient to form a belief as to the truth and accuracy of the allegation that the individual defendants R. B. Wilson, John Winthrop and Charles W. Cox II are all citizens of the State of New York, admits that defendant IteL Corporation is now and has been at all times relevant hereto a corporation incorporated under the laws of the State

of Delaware with its principal offices in the State of California, and denies each and every other allegation of paragraph 1.

2. Admits that plaintiff purports to be suing the individual defendants because of actions which arose out of their conduct as directors of GBW, admits the existence of Wis. Stat. §801.05(8), lacks knowledge or information sufficient to form a belief as to the truth and accuracy of the allegation that the individual defendants are subject to the personal jurisdiction of the courts of the State of Wisconsin and of this court, lacks knowledge or information sufficient to form a belief as to the truth and accuracy of the allegation that the defendant Itel is engaged in substantial and not isolated activities within the State of Wisconsin, lacks

knowledge or information sufficient to form a belief as to the truth and accuracy of the allegation that Itel is therefore subject to the personal jurisdiction of this court under the provisions of Wis. Stat. §801.05(1)(d), admits the existence of Wis. Stat. §801.05(1)(d), and denies each and every other allegation of paragraph 2.

3. Admits that plaintiff purports to bring this action on behalf of himself and all holders of Class B Debentures of GBW as of November 28, 1977, similarly situated, admits that the number of Class B Debentures outstanding as of that date was 6,376, and lacks knowledge or information sufficient to form a belief as to the truth and accuracy of the remaining allegations of paragraph 3.

4. Lacks knowledge or information sufficient to form a belief as to the truth and accuracy of the allegations of paragraph 4.

5. Denies the allegation that from time to time prior to November 28, 1977, GBW had repurchased and held as treasury shares substantial amounts of Class A or Class B Debentures, affirmatively alleges that the word "shares" is inappropriate to describe the Class B Debentures, and admits the remaining allegations of paragraph 5.

6. Admits the existence of Biltchik v. Green Bay & Western Railroad Company, 250 Wis. 177 (1947) and the accuracy of the quotation therefrom; but insofar as any facts are alleged, denies each and every other allegation of paragraph 6, and affirmatively alleges on information and belief that the Class B

Debentures were issued to the holders of income bonds, common stock and preferred stock of the old company.

7. Admits the existence of the Biltchik case and the accuracy of the quotation therefrom; but insofar as any facts are alleged, denies each and every other allegation of paragraph 7, and affirmatively alleges on information and belief that since 1896 the Class B Debentures have been treated as debt instruments, transactions in Class B Debentures are not recorded, Class B debentures are not registered, holders of Class B debentures never have been allowed to vote or attend shareholders meetings, and holders of Class B debentures have never been accorded the right to inspect the corporate books and records.

8. Admits the existence of the Biltchik case and the accuracy of the

quotations therefrom; but insofar as any facts are alleged, denies each and every other allegation of paragraph 8.

9. Admits that the holders of the Class B debentures of GBW are entitled to payment pro rata after payment of the outstanding par value of the capital stock and Class A debentures of the GBW upon a sale of the assets of the GBW or a reorganization thereof; denies each and every other allegation of paragraph 9; and affirmatively alleges that the holders of Class B debentures are entitled to no more than \$1,000 per \$1,000 face value of debenture upon the sale of the assets or a reorganization of GBW.

10. Admits that on November 28, 1977, the individual defendants were Directors of GBW, and denies each and every other allegation of paragraph 10.

11. Admits that in 1977, Itel commenced efforts to acquire a controlling interest in GBW, admits that after November 28, 1977, Itel purchased approximately 99% of the outstanding common stock of GBW, admits that this purchase of a 99% interest in the common stock of GBW gives Itel some measure of control over GBW, and denies each and every other allegation of paragraph 11.

12. Admits the allegations of paragraph 12.

13. Admits that the individual defendants, as of November 28, 1977, owned 5,344 shares of GBW common stock, admits that 2,660 shares of GBW common stock were held by members of families of the individual defendants or held in trust, making a total of 8,004 shares of GBW common stock owned or controlled to some extent by the individual defendants,

and lacks knowledge or information sufficient to form a belief as to the truth and accuracy of the remaining allegations of paragraph 13.

14. Admits that between 1974 and 1977, other railroad companies and companies engaged in railroad equipment leasing operations, including ITEL, made tender offers to acquire control of GBW by tendering offers to acquire the securities of GBW, admits that the GBW Board of Directors, prior to November, 1977, had favored at least one such prior tender offer, and denies the remaining allegations of paragraph 14.

15. Denies each and every allegation of paragraph 15.

16. Denies each and every allegation of paragraph 16.

17. Denies each and every allegation of paragraph 17.

18. Denies each and every allegation of paragraph 18.

19. Admits that Itel made a tender offer in an attempt to purchase a controlling amount of GBW common stock, admits that the holders of GBW common stock received \$330 per share for the common stock which they held, if they tendered it in response to the Itel tender offer, admits that the common stock had a par value of \$100 per share, and denies each and every other allegation of paragraph 19.

20. Admits that Itel has offered no more than \$325 for each Class B debenture, and denies each and every other allegation of paragraph 20.

21. Denies each and every allegation of paragraph 21.

22. Denies each and every allegation of paragraph 22.

23. Denies each and every allegation of paragraph 23.

DEFENSE

1. The Amended Complaint fails to state a claim upon which relief can be granted against defendant GBW. There are no well-pleaded facts in the Amended Complaint which, taken as true for the purposes of this defense only, could support the entering of any relief as against defendant GBW.

AFFIRMATIVE DEFENSE

The rights of the holders of Class B debentures of GBW have been determined in a previous litigation entitled Biltchik v. Green Bay & Western Railroad Company, 250 Wis. 177 (1947). As a matter of res judicata, the holders of Class B debentures are entitled to no more than \$1,000 per \$1,000 face value of debentures upon the sale of the assets or a reorganization of GBW.

PRAYER FOR RELIEF

1. That the prayer of plaintiff that an order be entered allowing this action to be maintained as a class action be denied;

2. That the Amended Complaint be dismissed, on the merits, with prejudice, and an order be entered awarding defendant GBW its full costs, disbursements, expenses and attorneys fees incurred in answering the Amended Complaint;

3. That if this Court should find that any holder of Class B debentures should recover in this action, this Court should also find that the amount a holder of Class B debentures of GBW could recover upon a sale or reorganization of GBW is limited to \$1,000 per \$1,000 face value of debenture;

4. That defendant GBW be awarded its costs and attorneys fees pursuant to Wis. Stat. §814.025(1), and that such award be taxed to the plaintiff, his attorneys or both, as the Court deems just, pursuant to Wis. Stat. §814.025(2); and

5. That defendant GBW be awarded such other and further relief as may be appropriate.

Dated this 7th day of August,
1981.

THOMAS O. KLOEHN
CHARLES A. GRUBE

Attorneys for Defendant
Green Bay & Western
Railroad Company

Of Counsel:

Quarles & Brady
780 North Water Street
Milwaukee WI 53202
(414) 277-5000

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Direct Inquiries To:

Thomas O. Kloehn
(414) 277-5000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amended Answer of Green Bay & Western Railroad Company was this date served upon the plaintiff by mailing a copy thereof to the attorney for the plaintiff, postage prepaid, at his last known address, to wit:

Robert K. Steuer, Esq.
Weiss, Steuer, Berzowski,
Brady & Donohue
Suite 1500
700 North Water Street
Milwaukee WI 53202

Dated this 7th day of August,
1981.

Charles A. Grube

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